VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

DAUNIS MCBRIDE AND T. B. BENSON, *Associate Editors.*

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Out of thirteen cases in which opinions were handed down by our Supreme Court on November 16th last, Judge Sims dissents in four.

Qualification by Distributees and Legatees—Waiver in Favor of Third Party. Judge Sims' Dissenting Opinion.

In the case of *Thompkins Admr.* v. *Poff* it does seem to us that the law should be as Judge Sims would have it and we think the decision of the majority of the court establishes a dangerous precedent.

The case is simply this: On June 7th, 1915, J. W. Poff died testate as to part of his estate and intestate as to the residue, naming no executor in his will. He left seven sons and three daughters and three infant grandchildren born of a deceased daughter. *Three days after his death* his will was probated and, on the motion of four of his sons who waived their rights, one Tompkins was appointed Administrator, c. t. a.

Shortly after, Wm. H. Poff, one of the sons of J. W. Poff who had not waived his right to qualify, gave notice that he would move the judge of the circuit court to revoke the administrator's authority and appoint him; but the judge overruled his motion. The three sons who had not waived their rights appealed from this decision, but did not prosecute the appeal. Lewis Poff then applied to the clerk to have himself appointed administrator and, from the order of the clerk refusing to appoint him, appealed to the circuit court, which vacated the appointment of Thompkins and granted letters of administration with the will annexed to Lewis Poff.

Tompkins appealed from this order and the Supreme Court, Sims, J., dissenting, reversed the lower court and confirmed the appointment of Tompkins.

The whole case depends, as the court says, upon the construction of §§ 2637-2639 and 2640 of the Code of 1904.

Section 2637 provides that where no executor is appointed by the will, etc., etc., the court or clerk may grant administration, c. t. a., to the person who would have been entitled to administion if there had been no will, etc., etc.

Section 2639 provides that where a person dies intestate,

> "Administration shall be granted to the distributees who apply therefor, preferring first the husband or wife, and then such of the others entitled to distribution as the court or clerk shall see fit. But any of the distributees may at any time waive their right to qualify in favor of any other person to be designated by them. If no distributees apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors or to any other person."

Section 2640 provides:

> "If after administration is granted to a creditor or other person than a distributee, any distributee who shall not have before refused shall apply for administration, there may be a grant * * * of administration after reasonable notice to such creditor or other person in like manner as if the former grant had not been made, and the former grant shall thereon cease."

The result of the court's decision in the present case is to allow any distributee who is quick enough about it to slip into the clerk's office and have any person he may designate appointed as administrator, no matter how distasteful or unacceptable to all the other distributees. We cannot believe that this was the intention of the statute which gives the first right to distributees, but providing that any one distributee may waive *his* right to appointment in favor of any other person to be designated by them. This does not mean necessarily—as the decision of the court now makes it mean, that the person so designated shall be appointed by the court to the exclusion of all others having a right to qualify. This would work an injustice which we do not think was intended by the statute, and makes it in fact read that any distributee may have anybody he chooses appointed to the exclusion of every other distributee. He may be *prior in tempore,* but we do not think he can be *prior in jure* in such a case.

For the object of the statute was plainly to keep the admin-

istration of the estate in the family and to prevent the intrusion of strangers in the settlement of the family estate, and in case none of the distributees cared to qualify or all refused, then the first who appeared and waived his right might designate the administrator. Suppose all of the distributees appeared at the same time in the clerk's office and all applied at once for qualification: Then the clerk or judge would clearly have the right to appoint all of the distributees as administrators—of any one of them he saw fit. Suppose four of these ten children had applied for qualification and at the same time one had appeared and waived his right and designated Thompkins as his choice—Would the clerk have had the right to appoint Tompkins, to the exclusion of the others? We think not. In our view the concluding clause of § 2639 was intended to postpone any other qualification than a distributee until thirty days after the testotor's death, in order to give full time for every distributee to have a chance to be heard. And in our judgment § 2640 was intended to give such distributee as had had no chance to appear and ask for appointment an opportunity to avail himself of the benefit of § 2639. Otherwise it is practically useless. As Judge Sims well remarks, the words "any other person" are used in both sections and must be understood as referring to those other than the distributees whose qualification after it has been granted must give way in favor of any distributee applying for grant of administration under § 2640, in the event that after administration is granted to any other person than a distributee any distributee who shall not have before refused shall apply for administration. The legislature in using the words "any other person" in both sections must have intended to mean the same class, and certainly—unless there is some ambiguity—which we insist does not appear in the present case—the courts should so hold.

In our humble judgment this law as now interpreted by the court will render qualifications on estates fraught with much danger of family disputes and open to caprice and misunderstanding.

Christian Science as Practicing Medicine.

Mr. Clifford P. Smith, of the Committee on Publication of the First Church of Christ Scientist, Boston, Mass., writes us a very courteous letter calling our attention to what in his judgment is an inaccurate report of the case of *People* v. *Cole*, 113 Northeastern Reporter, 790. The inaccuracy to which he calls our attention is not our own, but was taken from the *New York Times'* report of the case. But Mr. Smith's statement is that the patient in this case was a female detective employed by the New York County Medical Society, and that whilst she evinced a willingness to get as much evidence against the defendant as possible, she didn't succeed in getting him to hold her hands, as the *New York Times* stated. What he did was to pray for her silently, to speak to her about God, and to support what he said by reading from the Christian Science text book "Science and Health, with Key to the Scriptures." The conviction of the defendant in that case was reversed by the New York Court of Appeals, the opinion being delivered by Judge Chase, and which we quoted in our November editorial. We quote further from the opinion of the Court of Appeals which found that Cole was one of the recognized practitioners of the church who, "in the present case, assumed by silent prayer and for a money consideration to practice the healing of a patient of trouble with the eyes and a pain in the back. He made no diagnosis and prescribed no other remedy."

"The tenets of a church are the beliefs, doctrines, and creeds of the church," the court held. "The exception relates to the tenets of the church as an organized body as distinguished from an individual. It does not relate to or except persons practicing in accordance with individual belief.

"It appears from the record that it is a tenet of the Christian Science Church that prayer to God will result in complete cure of particular disease in a prescribed, individual case. Healing would seem to be not only the prominent work of the church and its members, but the one distinctive belief around which the church organization is founded and sustained."

The opinion of the court points out that in some of the States the Christian Science Church is expressly excepted from the

prohibition contained in the medical practice acts. Judge Bartlett concurred in the opinion and said: "I concur in Judge Chase's construction of the statute. But I would go further. I deny the power of the Legislature to make it a crime to treat disease by prayer."

That the Legislature has not this power, and that the effort to amend the law so that Christian Science healers may be prosecuted if they practice, will fail, is the belief of many who have no special sympathy with the church or with its healers. It was practically admitted that the attempt of the medical societies to procure the legislation to be asked for would fail unless there appeared a strong public demand for it.

Mr. George W. Whiteside, counsel for the Medical Society of New York County, in an interview is quoted as follows: "No decision under the medical law has been handed down by the higher courts of this state which affects the interests of society so much as the decision of the Court of Appeals in the case of Peoples versus Willis Vernon Cole. The court has squarely held that the practice of healing by Christian Scientists is a religious tenet of a church, and, therefore, Christian Science healers are exempt from prosecution so long as that provision of the statute remains.

"Counsel has come to the conclusion that if the public is to be protected some drastic preventive measure ought to be taken that shall not be designed or interpreted as interfering with the religious liberty of any portion of the community, but which shall safeguard the public health of the community by strengthening the arm of the law in dealing with those who would improperly, for personal gain, take advantage of the situation which the Code decision has created."

Mr. Robert S. Ross, of the Christian Science Committee on Publication, however, in an article printed in the "Bench and Bar," explained the difference between the praying method of the church to cure bodily ills and the knife and medicine method of the surgeon and physician. He then continues in this article as follows:

"But how could the patient be forced to resort to the established school of medicine? Again, the distinction in method is of vital importance. A believer in the use of drugs might resort

to some unlicensed quack or harmful nostrum, and receive serious injury. In his case there might have been protection in a law forbidding the quack to practice, or preventing the sale of the nostrum. Christian Science, however, holds out no hope to such a person. His belief that the seat of the disease is in the body, and beyond the control of the mind, would prevent his resorting to it. On the other hand, if the patient did believe in the healing power of the mind, and disbelieved in material methods, it is difficut to see how the legislature would protect him by forbidding the Christian Scientist to practice. He could not then resort to such a practitioner, but neither would he apply to the established school of medicine."

We are obliged to Mr. Smith for calling our attention to the fact that the last General Assembly repealed the act referred to in our November editorial by an act to be found on page 139, Session Acts of 1916. Section 11 of this new act reads in part as follows. "Nothing in this act shall be construed to affect * * * or to limit in any way * * * the practice of the religious tenets of any church in the ministration to the sick or suffering by mental or spiritual means without the use of any drug or material remedy, whether gratuitously or for compensation, provided sanitary laws are complied with."

It might therefore be thought that it is no longer unlawful in the state of Virginia for the practitioners of healing by Christian Science to carry on their profession, and yet is the question entirely free from doubt?

"The practice of the religious tenets of any church in the ministration to the sick, etc.," is not affected or limited in anyway, "provided sanitary laws are complied with."

Now if one of the religious tenets of the Christian Science Church consists in the ministration to the sick, etc., by mental or spiritual means, then any one so practicing or carrying out these tenets is not forbidden to so minister. But in the case of diptheria, small pox or such other diseases how can a Christian Scientist minister to those affected with such diseases and observe the sanitary laws, which require isolation and sanitation without violating the tenets of the church? We leave the discussion of the question to some one better acquainted with the tenets of that church and its methods of practice.

Very little attention seems to have been paid to this new and rather startling Federal enactment, which became law one day after its passage on September 8th, 1916.

The Federal Inheritance or Estate Tax.

Probably estates in excess of fifty thousand dollars are so rare in this Commonwealth that few people feel concerned over it; but its provisions should be carefully studied by all personal representatives who qualify upon estates over fifty thousand dollars net value.

The estate to be taxed is determined by including in it the value at the time of the death of any person, of all property, *real* or personal, tangible or intangible, wherever situated, owned by the decedent.

From this is to be deducted in case of a resident: 1. Such amount for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered. 2. An exemption of fifty thousand dollars. In the case of a non-resident the exemption is made by deducting from the value of that part of his gross estate, which at the time of his death is situated in the United States, that proportion of the deductions specified in the paragraph (1) which the value of such part bears to the value of his entire gross estate wherever situated. But no deduction is allowed in the case of a non-resident unless the executor includes, in the return required to be filed, the value at the time of the non-resident's death of that part of the gross estate not situated in the United States.

The tax is a graduated one.

One per centum of the amount of the net estate not in excess of fifty thousand dollars; two per cent. of the amount by which such net estate exceeds fifty thousand dollars and does not exceed one hundred and fifty thousand. Then the tax mounts

up until the fortunate possessor of a million pays five per cent. on the net estate which exceeds four hundred and fifty thousand dollars and does not exceed one million dollars. Ten per cent. is the tax when the net estate exceeds five million dollars.

The tax is due one year after decedent's death. If paid before it is due there is a discount of five per cent. per annum calculated from the time payment is made to the date when the tax is due. If not paid within ninety days after it is due ten per cent. interest is charged *from the time of the decedent's death,* unless because of claims against the estate, necessary litigation or other unavoidable delay the collector finds the tax cannot be determined, in which case the rate of interest shall be six per cent. from the time of the decedent's death until the cause of such delay is removed and thereafter at the rate of ten per cent. per annum. Litigation to defeat the payment of the tax is not to be deemed necessary litigation. The executor, which means the personal representative or any person taking possession of any property of the decedent, must within thirty days after qualification or after coming into possession of any property of the decedent, whichever event occurs first, give written notice thereof to the testator, and must file a return under oath in duplicate setting forth (a) the value of the gross estate at time of decedent's death, or in case of a non-resident, of that part of his gross estate situated in the United States (b) the deductions mentioned heretofore (c) the value of the net estate as heretofore defined; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

The tax is made a lien for ten years.

If the decedent makes a transfer of or creates a trust with respect to any of his property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in case of a bona fide sale for a fair consideration in money or money's worth) and if the tax be not paid when due, the transferee or trustee shall be personally liable therefor and the property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a lien equal to the

amount of the tax. Any transfer of a material part of decedent's property made within two years prior to his death without a fair consideration shall, unless shown to the contrary, be deemed to have been made in contemplation of death.

These are a few of the very salient points of this act, which is quite lengthy and should be carefully studied. Every clerk's office in the state should have a copy of it and we suggest that each clerk write to his representative in Congress and ask to have forwarded to him Regulations No. 37, Treasury Department, United States Internal Revenue, which not only gives the act, but the rulings of the Commissioner of Internal Revenue on each section thereof.

It should be noted that estates of non-residents are not allowed the exemption of fifty thousand dollars.

It should also be noted that under the ruling of the Commissioner neither the thirty days' notice nor return is required except where the gross estate exceeds sixty thousand dollars, or the net estate fifty thousand dollars

Where no executor or administrator qualifies, the beneficiaries are required within thirty days to file the required notice. So must any person who within two years prior to decedent's death has received any material part of his property either as a gift in contemplation of death or by a transfer intended to take legal effect at decedent's death give the thirty days notice. With such notice the donee or transferee may file evidence to establish whether or not the gift or transfer was in contemplation of or intended to take effect at the donor's or transferor's death, etc., etc.

The act is clearly modeled on the English act and the English cases construing that act will be of much value in shedding light upon many of the questions which must necessarily arise in connection with the construction and administration of the act.

Members of the profession should make themselves familiar with this act and advise both personal representatives and beneficiaries as to its provisions whenever they are employed to probate a will or have qualification made upon an estate in any event where the estate real and personal, wherever situate, amounts to fifty thousand dollars.

Can a Bachelor Have a Home?

While we are not aware that either the Commissioner of Prohibition or the Attorney-General has so ruled, various of the newspapers of the state have printed statements that a bachelor can not have a "home" under the Prohibition Act. Such is, seemingly, an erroneous construction of the act.

Section 61 defines a home to be "the permanent residence of the person and his family, and shall not be construed to include a club, fraternity house, lodge room or rooms, or place of common resort, or room of a guest in a hotel or boarding house." Reference should also be had to § 16 relating to the keeping and giving away of ardent spirits. This section as well as § 61 in fact defines a "home." Under § 61, what is a "home" is the permanent residence of a person and his family, and what is not a "home" is a club, fraternity house, lodge room or rooms, place of common resort, or room of a guest in a hotel or boarding house. Any place which is the permanent residence of a person and his family and which does not come within one of these exceptions is his "home."

In a work recently prepared by the writer, entitled "The Virginia Prohibition Act," at page 19, it is said: "The test of what is a home would seem to be, is such place the separate residence of the person, as distinguished from a lodging room or other place of abode mentioned in the exceptions. The words 'and his family' in many instances have no force, for two reasons: (1) the person may have a home without having a family, and (2) he may have a family and yet his place of abode may be a lodging room, room in a hotel or boarding house."

It is clearly the intention of the legislature by excluding clubs, lodge rooms, etc., to mean that all other places of permanent residence of a person shall be his home. The words "and family" apply where a man has a family, if the act is to be construed as any other statute or contract. If one enter into a contract to board a man and his wife for one year, and the wife should die, the contract would be construed to mean that the husband should be boarded although he had no wife.

The conjunction "and" means in addition to. If a person were indicted for selling whiskey and beer in violation of the act,

would it for a moment be contended that he could not be convicted upon evidence of the sale of either whiskey or beer? "The word 'and' commonly means 'in addition to,' and should be so construed in Rev. St. 1893, c. 43, § 16, making it a criminal offense to sell intoxicating liquors outside of cities, towns, and villages 'in any less quantity than five gallons, and in the original package as put up by the manufacturer,' so that sales of less than five gallons are prohibited except when contained in an original package. Tipton *v.* People, 156 Ill. 241, 40 N. E. 838, 839." 1 Words & Ph. 386.

Had the legislature intended that in order to have a home a person must have a family they would have said "the permanent residence of both the person and his family" or would otherwise have expressly made the having a family a condition to having a "home."

A statute is to be construed to avoid unconstitutionality. If the act were construed to classify married and single men as such it would undoubtedly be unconstitutional. While the legislature may classify married persons, and such classification may not be objectionable on the ground that others can not enter the class, all class legislation must be founded upon reason and necessity and must not be merely arbitrary. There is no reason for permitting the use of ardent spirits by married persons and forbidding their use by unmarried persons. Such classification is purely arbitrary and a construction in favor of it would render the provision of the act unconstitutional. This section of the act may then be in part unconstitutional because of an arbitrary classification of persons. There is a reason to declare that clubs, fraternity houses and places of common resort shall not be a "home," but there is probably nothing for so declaring a room in a boarding house. To such extent the provision is probably unconstitutional.

Judge Allan R. Hanckel, of the Corporation Court of Norfolk in the case of Com. *v.* Mahoney, instructed the jury as follows: "The court instructs the jury that a man, though unmarried and having no family of his own, may have a 'home' within the meaning of the state prohibition law and is entitled to the privileges and immunities thereby allowed."

Instructions upholding the contention of the Prohibition Commissioner that the phrase "a permanent residence of a man and his family" means that a man without family has no home under the law and can not, therefore, keep ardent spirits in his possession were not allowed by the court.

T. B. B.

Indexing Law Reports.

It is probable that such a thing as a good index will never be written. In this line human endeavor has always fallen far short of perfection, and it must be admitted that if a perfect index were written it would not give satisfaction. The reader always desires that the point sought for be indexed on the very page at which he opens a book, and not finding it there he is disappointed.

Despite the fact that indexing may never reach the point of perfection nor ever give absolute satisfaction, the present scheme of indexing law reports could be very much improved upon. At present a law report is, in fact, not indexed but digested, by printing in full the headnotes of the cases with occasional references from other title heads. To this system there are two great objections, the first being that it is too cumbersome and requires too much actual reading to find the point desired, and the second that the cross references are too difficult to run down. There is nothing more provoking to the eager searcher when he finds what he thinks is the exact point desired to realize that he has discovered merely a cross reference to something else, unless it be that when he has looked at this "something else" that the cross reference has misled him.

It is suggested that the index to a law report be written like any other index, with catchlines instead of headnotes, and more catchlines and citations instead of cross references. The reporter designates his headnotes by separate and single title heads, which is both necessary and proper, but there is no reason why this idea should not be departed from in indexing. Headnoting is properly digesting but indexing is not.

The National Reporter System scheme of indexing is the same as that of the different state reporters, except that all headnotes

of great length are condensed into shorter statements, which makes the index of less bulk and requires less reading to find the point desired. Would not this index be a much readier guide were the catchlines on the headnotes of the cases repeated in the index? What is here said is not intended as an adverse criticism of the index of the National Reporter System. On the contrary, we are convinced that such indexing is superior to that of most, if not all, other law reports.

What is here suggested is that the index to law reports should be so compiled as to fully and readily direct one to the points decided in the opinions, and that it be not a mere compilation of the headnotes of the decisions.

T. B. B.